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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 1424

ANNIE C. GORNTO,
Petitioner,

v.

THE STATE OF GEORGIA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF OF RESPONDENT IN OPPOSITION

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The opinion of the Supreme Court (App. A of Petition) is reported at 227 Ga. 46. The case was not tried in the Superior Court of Glynn County, Georgia as indicated in the Petition. A transcript of the proceedings in the State Court of Glynn County is included as part of the record in the Supreme Court of Georgia.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

(1) Whether the constitutional right to mere possession of obscene material, recognized in *Stanley v. Georgia,* 394 U.S. 557 (1968), necessarily implies a constitutional right to purchase such material and, hence, by derivation, a constitutional right of others, including the petitioner, to sell it.

(2) Whether the Constitution requires an adversary hearing on the question of obscenity of publications prior to the institution of a criminal action against the distributor, when the publications have been obtained by purchase and there has been no seizure of the publications as evidence.

(3) Whether the evidence was sufficient to sustain the conviction of the petitioner, Annie C. Gornto, for the offense of selling obscene materials as defined in section 26-2101 of the Criminal Code of Georgia (1968).

STATUTES INVOLVED

The statutes involved are adequately set forth in the Petition.

STATEMENT OF THE CASE

The statement of the case contained in the Petition is inaccurate in several material areas. In an apparent attempt to piggy-back this actual situation onto the Court's holding in *Stanley v. Georgia,* 394 U.S. 557 (1968), the petitioner, Annie C. Gornto, states that she was

charged with "possession and sale" of an obscene publication. The Record in the case indicates that Mrs. Gornto was charged by accusation with having sold on January 14, 1970 certain obscene materials to one Larry David James. (Record Glynn State 4-5). (The Record forwarded to this Court by the Supreme Court of Georgia consisted of the Record in the State Court of Glynn County, a transcript of the trial and other proceedings in the State Court, and the papers entered upon the record in the Supreme Court of Georgia. Unfortunately, the pagination of the fully integrated Record as filed with this Court is not available to counsel for the respondent. Further, it appears that the references in the Petition are to the record in the original trial court and the transcript of proceedings in the original trial court.)

Mrs. Gornto was arraigned in the State Court on February 23, 1970, and the case came on to trial on March 2, 1970. From the evidence in the case it appeared that an eighteen-year-old boy, Larry David James, purchased from Mrs. Gornto a publication entitled "Whiplash Lovers" from an open display. (Transcript 42, 43, 45). James testified that he selected the publication based upon the photograph on the cover. (Transcript 47-8). The publication which James purchased from Gornto is before the Court. (Transcript 245). A verbal description of the contents of the publication summarized from its entirety were placed before the original trial court. (Transcript 104-26). The jury returned a verdict finding Mrs. Gornto guilty of the offense of selling obscene materials, a misdemeanor as defined by Ga. Code § 26-2101. On appeal, the conviction was affirmed by the Supreme Court of Georgia.

ARGUMENT

Before proceeding into more detailed areas of argument, it might be well to note by way of elimination what this case is not. First of all, contrary to the assertions in the Petition, this case does not involve a prosecution for the possession of obscene materials. Secondly, this case does not involve a prosecution directed against a publication per se. It is a prosecution of the conduct of the petitioner relative to the material. Thirdly, it is not a case involving seizure of any materials as evidence, the material utilized as evidence in the case having been purchased by a member of the general public, to whom it was offered for sale, and by him delivered to the prosecuting authorities as evidence.

I.

THE DECISION BELOW IS CLEARLY CORRECT

The decision in the court below was a clearly correct disposition of the particular facts constituting the case against Mrs. Annie C. Gornto. The court below was eminently correct in holding the statute in question to be constitutional. This decision was based, in so far as the federal constitutional attack was concerned, upon a decision of this Court on the very same statute. *Gable v. Jenkins,* 309 F.Supp. 998 (N.D. Ga. 1969), *aff'd.* 397 U.S. 592, 90 S.Ct. 1351, 25 L.E.2d 595 (1970). An examination of the jursidictional statement filed in *Gable v. Jenkins* with this Court, October Term, 1969, No. 1049, will confirm the fact that the constitutional claims based upon alleged vagueness, derivative right of distribution, and necessity for an adversary hearing prior

to institution of criminal action, were all considered and rejected by this Court.

The court below correctly held that the evidence fully supported a conviction. In the first place, it was extremely clear that viewing every factor in its most favorable light from the perspective of Mrs. Gornto, she stood in violation of the statute in that the material which she sold to Larry James constituted a commercial exploitation of erotica solely for the sake of its prurient appeal. This factor clearly emerged from a consideration of the mode and method of display and the cover of the particular item, all of which factors were fully developed in the trial of the case. The jury was fully instructed on this aspect of Georgia law. (Transcript 229).

While that portior of the opinion of the court below which is complained of in subpart IV of the Petition may leave something to be desired, it does not constitute a certworthy issue since it complains of a position strongly and adamantly assumed by the petitioner at the original trial. When the State undertook to introduce testimony for the purpose of establishing community standards of national scope, Mrs. Gornto's counsel objected, taking the position that the appropriate standard was the standard of the local community. (Transcript 137-8). Further, during the trial of the cause Mrs. Gornto's counsel complained that there was no one fully acquainted with the locality to testify as to what the local community standards were. (Transcript 196). Further, in the Enumerations of Error and the Appellant's brief to the Supreme Court of Georgia, the complaint was again directed to the sufficiency of the evidence to establish community standards in accordance with Mrs. Gornto's original theory of the case. Now, before this Court, Mrs. Gornto

faces in the other direction. It is strongly submitted that it would be as unseemly as "Whiplash Lovers" to allow Mrs. Gornto to take advantage of a possible error in the posture which she herself insisted upon in the original trial court.

It cannot be too strongly urged that it is Mrs. Gornto's conduct in having sold the material in question which forms the subject-matter of her prosecution and conviction. The material in question was considered as an element making criminal Mrs. Gornto's conduct. The material in question is before this Court. Further, this Court has held in deciding an obscenity question that the materials are sufficient in themselves for the determination of the question. *Ginzburg v. United States,* 383 U.S. 463, 465 (1968). Further, evidence of the setting within which the conduct resulting in conviction took place was before the court below. In contrast, there was absolutely no testimony on the part of Mrs. Gornto, nor any argument, which would tend to establish even a scintilla of artistic or social value justifying the sale of such materials.

The publication is entitled "Whiplash Lovers", Vol. 1, No. 1. The typical pandering come-on "adults only" appears on the cover together with a listing of the items to be found therein. The cover consists both front and back of color photographs which, in the setting of the case, really defy description. Whether the statement that one picture is worth ten-thousand words be quantitatively accurate, it is readily apparent that an attempt to verbally describe the cover would be somewhat futile. In fact, the use of polite terminology to describe the rawness of the photographic representations contained upon the covers and within this publication

would only tend to falsely dignify this morbid, brutally dehumanized montage of sexual images and organs presented in an extremely impersonalized and animalistic fashion.

The publication consists of forty-six pages, including the outside covers. The vast bulk of these pages are taken up by full-sized photographs generally of a man and a woman variously intertwined, sometimes of two women similarly intertwined, and almost universally showing fully exposed the sexual organs of both persons. The extremely small amount of textual material, none of which appears to have any discernible relationship to the photographs which constitute the major portion of the material, conveys the same morbid, dominant theme which could only appeal to the prurient interests. Counsel for the State need not undertake to state with certainty an accurate definition of hard-core pornography. It is submitted that if this material does not constitute hard-core pornography, it is impossible to draft and manufacture material which would fit within that category. "Whiplash Lovers" is hard-core pornography.

II.

THE POSTURE OF THIS CASE PRESENTS NO CERTWORTHY ISSUE FOR DETERMINATION

As previously pointed out, the allegations relating to the unconstitutionality of the Georgia statute regulating the distribution of obscene material has already been settled by a recent decision of this Court contrary to the position taken by petitioner. *Gable v. Jenkins, supra.* Further, the only remaining contention of significance relates to an alleged error resulting from the posture

which the petitioner herself urged upon the original trial court. To grant certiorari in such a case would be to dignify the petitioner's own wrongdoing with respect to the judicial processes. Further, the circumstances of the sale in this case, considered in conjunction with the material itself, are sufficient to establish the pandering appeal previously held adequate to sustain convictions for conduct relating to obscene materials. Finally, the material itself, though not the exclusive basis of the conviction, was, and is, material which considered as a whole and not in isolated instances, appeals not primarily but solely to the prurient interest. Further, if the material in question in its appeal to the purient interest does not go beyond the customary limits of candor, then there are no limits, customary or preverse, to candor, a position which this Court, unknowledgeable public comment to the contrary, has never taken.

CONCLUSION

The petitioner has failed to demonstrate the compelling reason for this Court to exercise its discretionary jurisdiction for the purpose of reviewing her conviction. The application for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served true and correct copies of the foregoing Brief, in manuscript form, by mail, by depositing the same in a United States mail box, with first class postage prepaid, addressed to the following, who constitute all counsel of record:

Haas, Holland, Freeman, Levison & Gibert
2709 First National Bank Tower
Atlanta, Georgia 30303 (2 copies).

This 29th day of March, 1971.

/s/

DOROTHY T. BEASLEY

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This is to certify that I have this day served true and correct copies of the foregoing Brief, in printed form, by mail, by depositing the same in a United States mail box, with first class postage prepaid, addressed to the following, who constitute all counsel of record:

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This 5th day of April, 1971

HAROLD N. HILL, JR.

CERTIORARI
DENIED
N.C.R.